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Court Must Add NCLA-Obtained Documents Enumerating USDA’s Violations of FACA to Record

RCALF-USA, et al. v. U.S. Department of Agriculture, et al.

Washington, DC (December 3, 2020) – The New Civil Liberties Alliance, a nonpartisan nonprofit civil rights group, filed a [motion for completion of the record or for consideration of extra-record evidence](#) attaching nine incriminating documents in the U.S. District Court for the District of Wyoming in *R-CALF, et al. v. USDA, et al.* The [lawsuit](#) challenges USDA’s violation of both the Federal Advisory Committee Act (FACA) and the Administrative Procedure Act (APA) by establishing and utilizing two separate advisory committees to provide recommendations for implementing the mandatory use of “radio frequency identification” (RFID) eartags, but failing to follow the proper procedures for doing so.

In 2017, USDA’s Animal and Plant Health Inspection Service (APHIS) established the “Cattle Traceability Working Group.” NCLA client Kenny Fox was a member of the CTWG and a vocal critic of its proposals to require RFID eartags. Upon discovering that the CTWG was not producing the pro-RFID recommendations they desired, certain CTWG members sought to exclude anyone who opposed mandatory RFID from further participation, eventually starting a second advisory committee called the “Producer Traceability Council” or PTC. High-level USDA employees were actively involved with both the CTWG and PTC, but failed to follow the requirements of FACA by, among other things, ignoring public notice requirements and blocking participation of those opposed to RFID requirements. Mr. Fox and other cattle producers who oppose mandating RFID eartag use have been entirely excluded from PTC membership, with only pro-RFID individuals and companies (such as electronic eartag manufacturers) being allowed to participate.

The present motion is asking the court to add nine documents to the Administrative Record in this case. All of them are crucial to the issue at hand—showing that USDA “established” and “utilized” the CTWG and PTC as advisory committees in the development of the 2019 Factsheet and policy to move forward with mandating cattle and bison producers to use RFID eartags. The proffered documents enumerate the involvement of the senior USDA officials in creating and orchestrating the CTWG’s recommendations for USDA to adopt a mandatory RFID regime—such as organizing the Strategy Forum in 2017 where CTWG was established and later called “Our [USDA’s] National Forum,” as well as drafting the white paper in the aftermath.

The USDA’s briefs filed to date suggest that it will defend itself against R-CALF’s FACA claims by asserting that the Act is inapplicable to USDA’s interactions with the two advisory committees. It is important for the court to add the proffered documents to the Administrative Record in order to consider them when evaluating the ultimate question of whether USDA violated FACA when establishing and working with these two groups—while also failing to comply with the procedural requirements of the Act.

NCLA released the following statement:

“Our battle against USDA’s unlawful push to force livestock producers to use RFID eartags continues. Our latest efforts are designed to ensure that the Court has a full record on which to evaluate our FACA claim against USDA. While USDA has sought to avoid its obligations under FACA and the APA, we will keep moving forward to demand accountability and transparency in order to protect the constitutional and property rights of livestock producers throughout the country.”

— **Harriet Hageman, Senior Litigation Counsel, NCLA**

For more information visit the case page [here](#).

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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